



## Who needs capacity?

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### ABSTRACT

The UK Law Commission's Discussion Paper, *Criminal Liability: Insanity and Automatism*, recommends introducing the concept of capacity to the insanity defence. The concept of capacity has an established role in those parts of the law that concern the validity of the decisions that people make, for instance in composing a will or entering into a contract. Making mental capacity a criterion for criminal responsibility in a mentally disordered defendant, however, is potentially problematic. First, the term capacity already has several different meanings in the literature on the jurisprudence of mental abnormality. Second, using the concept of capacity in the way that the Law Commission proposes poses difficulties that relate to the provision of testimony by expert witnesses.

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### 1. Introduction

The UK's Law Commission published its Discussion Paper, *Criminal Liability: Insanity and Automatism*, in 2013. The changes to the criminal law of England and Wales that the paper recommends include introducing the concept of capacity to the insanity defence or, to use the Commission's more cumbersome but less archaic form of words, to the defence of, "not criminally responsible by reason of recognised medical condition."

The concept of capacity, or mental capacity, has an established role in those parts of the law that concern the validity, or otherwise, of the decisions that people make. Examples include the decisions made in composing a will or entering into a contract. However, making capacity central to a mental condition defence in England and Wales is new and different. This paper examines the proposed introduction of capacity against two criteria.

The first criterion is that the wording of any proposed insanity defence should be consistent with the ways in which we habitually describe human action and, in particular, with developments in legal theory that relate to why some actions are excused. The second criterion is that the wording of a defence should take a form to which experts can usefully testify in court.

### 2. The Law Commission proposals regarding insanity

One reason why it can be difficult, in a criminal trial, to decide whether to hold responsible a defendant who did the act but claims that her mental state was abnormal, relates to the lack of objective

evidence. There is no brain scan or blood test to measure responsibility. The best witness to what was in the defendant's mind is usually the defendant, but she has an obvious interest in what the court decides. Other witnesses can offer descriptions of what the defendant said and did but these sayings and doings may not be reliable guides to what she was thinking.

The various versions of the insanity defence that have emerged at different times and in different legal systems have had to address this lack of an objective test of responsibility. In the absence of a scan or blood test, the wording of the defence provides the criteria against which a defendant's responsibility is assessed. In England and Wales, following the M'Naghten Rules, a defendant will be acquitted if due to a "defect of reason", a) she was unaware of the nature and quality of her act or b) she did not know that what she was doing was wrong.<sup>1</sup>

Having rejected "status" approaches, which would acquit any defendant who suffered from a qualifying medical condition, the Law Commission's alternative proposes that a defendant be acquitted if she, "wholly lacked the capacity" to do one of three things. The three things are: a) rationally form a judgement about the relevant conduct or circumstances, b) understand the wrongfulness of what she was doing and c) control her actions. The second and third things echo of the American Law Institute test (*American Law Institute, 1985*) which remains law in 18 US jurisdictions. That test refers to the, "substantial capacity either to appreciate the wrongfulness of [her] conduct or to conform [her] conduct to the requirements of the law."

Several terms in the Law Commission's suggested alternative have generated debate. The ability rationally to form a judgement, with its allusion to the M'Naghten Rules' "defect of reason", is one (*Fingarette &*

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<sup>1</sup> R. v. M'Naghten [1843] 10 Cl. and Fin. 200.

Fingarette Hasse, 1979; McAuley, 1993; Radden, 1985). In Scotland until 2010 the court asked whether the accused was, “influenced by his insanity, so that he was disabled from forming a rational decision in regard to [the act]” (Breen v. Breen<sup>2</sup> at 185; see also Gordon, 1978, pp. 374–376). There has been no uniformity, however, on how rationality should be defined (see Feinberg, 1970; Frankfurt, 1987; Gardner, 1998; Moore, 1984). The meaning of, “conform [her] conduct to the requirements of the law,” has also been contested (see *Insanity Defense Work Group*, 1983).

These arguments are longstanding and well-rehearsed, however. There has been less discussion of the implications of including a requirement for capacity into an insanity defence. This may be because the suggestion is somewhat unusual outside those jurisdictions that employ the American Law Institute test. The M’Naghten Rules are not the only version of the insanity defence to omit reference to capacity.

South African law permits acquittal where a defendant was, “incapable of appreciating the wrongfulness ... or of acting in accordance with that appreciation.” In South Australia, the Criminal Law Consolidation Act 1935 provides for acquittal if, “in consequence of the mental impairment”, a defendant a) does not know the nature and quality of the conduct, b) does not know that the conduct is wrong or c) is unable to control the conduct. In New Zealand, Section 23 of the Crimes Act 1961 permits acquittal where a disordered defendant was incapable of understanding the nature and quality of the act or of knowing that it was wrong.

### 3. Capacity, action and excuse

Insanity is usually described as an excuse for criminal wrongdoing (Hart, 1968) and lack of capacity as a form of excuse. The Law Commission, for the most part, follows this approach (see, for instance, *Law Commission*, 2013 at 1.19, 2.31, 5.89 and 5.93). There are other senses in which capacity is used, however (see Duff, 2007; Gardner, 1998; Hart, 1967; Horder, 2004). Depending on the sense, a defendant’s lack of capacity is sometimes treated as exemption that removes the need for an excuse, as irrelevant to whether an excuse is present or as capable of co-existing with criminal responsibility. Each of these alternative meanings represents a source of potential confusion should the absence of mental capacity become a criterion for legal insanity.

#### 3.1. Capacity, culpability and exemption

Some authors argue that a defendant’s lack of mental capacity is not a characteristic of excuse and that, on the contrary, in order to have an excuse a defendant must first have capacity. Those who lack capacity, the argument goes, are “exempt” from the strictures of the criminal law. They need no excuse to avoid conviction.

Anthony Duff distinguishes defendants who lack “capacity responsibility” from those who have an excuse for what they did (Duff, 2007, p. 286; see also Tadros, 2005). Horder, who thinks that impaired capacity can sometimes contribute to an excuse, nevertheless identifies a point at which lack of capacity goes “so deep” that an excuse is no longer required (Horder, 2004, p. 106; see also Horder, 1996). Other mental states that are sometimes treated, following similar arguments, as exemptions are infancy and automatism (see Gardner, 1998). Its general approach to responsibility and excuse notwithstanding, at points the Law Commission document makes the same distinction between excuse and exemption (see, “insanity is ... not a true excuse-type defence, but ... a denial of responsibility”; *Law Commission*, 2013, p. 200).

The cases Duff describes are at the extreme end of the spectrum of functional ability: Duff himself refers to the defendants that he is describing as “radically disordered” and their illnesses as “all embracing” (2007, p. 286). The core of the distinction made by Duff and others

between excuses and exemptions is that excuses require that the defendant be a “responsible agent” (Duff, 2007, p. 285) who has an “intelligible rational explanation” for their act or omission (Gardner, 1998, p. 588). It is only by examining such a rational explanation, the argument goes, that a court faced with a defendant claiming the excuse of duress, for instance, can decide whether she should be acquitted.

If a capacity-based insanity defence will be applied only to those who lack an “intelligible rational explanation,” how is this lack to be identified? Gardner defines those with intelligible rational explanations as having, “properly reflected reasons for action that [they] took themselves to have,” and, later, as people who, “reason intelligibly through to action” (Gardner, 1998, pp. 588, 589). Morally, however, the important point would seem to be whether their reasons were adequate, rather than intelligible. Even very ill people can have reasons that are intelligible especially if, as Gardner suggests, intelligible means no more than, “reasons for action that [they] took themselves to have.”

However, at no point in *Criminal Liability: Insanity and Automatism* does it appear that the Commission wish to see convicted those mentally ill people whose criminal acts were carried out for reasons that were intelligible only to them. Nor, it should be said, do those who refer to lack of capacity as an exemption wish to see this either: they simply do not then regard those defendants as needing an excuse. The confusion concerns the proper categorisation of the non-culpable and is one of terminology, not principle. But the need to avoid such confusion is an avoidable consequence of introducing the concept of capacity into a mental condition defence.

#### 3.2. Relevance of mental capacity to the excuses

Herbert Hart argued that it is morally wrong to punish where, “He could not have helped it,” or “He could not have done otherwise,” or “He had no real choice” (Hart, 1968, p. 152), a criterion modified by Frankfurt (1969). Frankfurt pointed to the case of a man who was coerced into a criminal act that he was intending to do anyway. In such a case, Frankfurt argued, we would be inclined to blame the man despite his inability to do otherwise. Frankfurt’s suggestion inserts an “only because” into Hart’s formulation. To Frankfurt, a person is not responsible for an act if he did it only because he could not have done otherwise.

Why might this be? Moore (1990) notes that the choice theory of excuse derives from a more general theory of responsibility whereby we are responsible for wrongs that we freely choose to do and not responsible for wrongs that we lack the freedom to avoid doing. In *Punishment and Responsibility* Hart had offered two justifications for basing excuses on choice. The first was utilitarian. Basing excuses on lack of choice maximised two competing priorities, individual freedom and crime prevention. Hart’s second justification was that fairness and justice demanded some such arrangement, whatever utilitarian balance was being sought.

Choice theory, however, is only one of several approaches to the analysis of excuse. The principal alternative approach has been called “character theory” (Moore, 1990). Character theorists see our characters as the ultimate objects of our responsibility and excuses as being present if, and only if, the criminal act is not expressive of our character (see Aranella, 1990). To some character theorists, capacity is not relevant to culpability. Tadros writes that an excusable defendant might have, “all of the capacities of a healthy defendant,” provided that her beliefs and desires at the time she acted were not part of her “settled character” (Tadros, 2005, p. 347).

#### 3.3. Capacity and choice theory

Capacity theorists thus have to decide when an act is truly expressive of someone’s character. The equivalent decision for choice theorists whether choice is truly lacking. Hart argued that individuals were

<sup>2</sup> Breen v. Breen [1961] S.C. 158.

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